

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

WENDELL DUNCAN, # 32726

PLAINTIFF

VERSUS

CIVIL ACTION NO. 3:15cv473-DPJ-FKB

A.D. CRAWFORD

DEFENDANT

ORDER

Before the Court are *pro se* Plaintiff Wendell Duncan's Motion for an Attorney [10], Motion for Relief from Judgment or Order [11], and Affidavit [12]. The Court denied Duncan permission to proceed *in forma pauperis* and dismissed this case without prejudice on August 28, 2015. Order [4]. On October 22, the Court denied reconsideration. Order [9]. On November 16, Duncan moved for counsel and, invoking Federal Rule of Civil Procedure 60, for relief from the Order denying reconsideration. On December 4, Duncan filed the Affidavit. For the reasons set forth below, the motions are denied.

I. Motion for Relief from Judgment or Order

"[T]he court may relieve a party . . . from a final judgment [or] order . . . for . . . newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)" Fed. R. Civ. P. 60(b)(2).¹

Duncan claims that he "has discovered new evidence that could not have been diligently discovered earlier, when Duncan filed this Complaint. Duncan has two cataracts, one in each eye and the doctor . . . [at South Mississippi Correctional Institution] will not treat it [sic]." Pl.'s

¹Though filed under Rule 60(b)(2), the motion was filed within the time limit for a Rule 59(b) motion. It would not make a difference.

Mot. [11] at 2. Duncan also complains that he is being denied the ability to file grievances regarding the cataracts and HIV-infected kitchen workers. *Id.* at 4. Finally, he alleges that “since the filing of this Complaint, Duncan has developed . . . diabetes and he is, [sic] being denied to [sic] receive proper treatment.” *Id.* at 5.

In support of the cataracts claim, Duncan presents a sick call request form, dated September 22, 2015, in which he requests to see the doctor for “the cataract in my eye.” Pl.’s Mot., Ex. 1 [11-1] at 1. This sick call request was submitted seven days after the first Motion for Reconsideration [6] was filed. Duncan also attaches a grievance, also dated September 22, in which he states that he requested to see the doctor about the cataract three times, and claims to have been only seen once. *Id.* at 2. On October 7, the grievance “concerning eye treatment ha[d] just started” and was being reviewed by the Mississippi Department of Corrections (“MDOC”). *Id.* at 45–46. As of November 18, this grievance was still “in progress” in MDOC’s Administrative Remedy Program. Pl.’s Aff. [12] at 9. This alleged new evidence fails to indicate that Duncan was in imminent danger at the time he filed his Complaint on June 18, 2015, or at the present time.

Significantly, the only defendant Duncan named in his Complaint was A.D. Crawford, who allegedly saw Duncan over a three year period at Duncan’s prior prison facility. The claims against Crawford were necessarily related to a past harm and not an imminent danger.

Duncan has raised new claims in his motions for reconsideration that might relate to his current facility. But those claims appear to be in the administrative appeal process and are not part of his original Complaint. As such, they do not establish that this Court erred in its

imminent-danger determination or in the first Order denying reconsideration. Duncan presents no other basis for reconsideration.

II. Motion for Counsel

Since the Court denies reconsideration, the motion for counsel is denied.

IT IS THEREFORE ORDERED AND ADJUDGED that, for the foregoing reasons, *pro se* Plaintiff Wendell Duncan's Motion for Relief from Judgment or Order [11] should be and is hereby **DENIED**.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff's Motion for an Attorney [10] is **DENIED**.

SO ORDERED AND ADJUDGED this the 17th day of December, 2015.

s/ Daniel P. Jordan III
UNITED STATES DISTRICT JUDGE